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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1968

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 392 F.2d 448.[1] The opinion of the district court (Pet. App. A, 1–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. A timely petition for rehearing was denied on February 28, 1968. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 24, 1968, and the petition was filed

[1] The opinion below (C.A. Op.) is reproduced between the brief and Appendix A of the petition. Its pagination runs from 1 through 8, and is followed by the one-page appendix of the court of appeals consisting of a map showing the area in dispute.

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on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the actual markings, on the ground, of an official public lands survey controls the boundaries of the township it created.

STATUTE INVOLVED

43 U.S.C. 752[2] provides in pertinent part:

> The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:
>
> First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate * * *.
>
> Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof. * * *
>
> Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return * * *.

[2] 43 U.S.C. 752 is an updated and revised version of Ch. 14, Sec. 2, of the Act of February 11, 1805 (2 Stat. 313) (see Pet. App. B-3, 2-3).

STATEMENT

Petitioner Weyerhaeuser Company brought suit against the United States for damages for the alleged conversion of timber during a road-building project on land in Western Oregon which it claimed it owned. The United States also asserted ownership of the land in question as its defense to the action.

Petitioner owned Sections 31 through 35 in Township 27 (T. 27 S., R. 8 W., hereinafter "T. 27"), which were situated immediately north of the disputed area and, it claimed, included the disputed area—a strip of land containing some 45.95 acres. Patents to these sections of public lands in T. 27 were first issued beginning in 1903, and petitioner obtained title through conveyances from various patentees. The United States claimed the disputed area as unpatented public lands not surveyed prior to 1961.

The facts as to surveys were that one Hathorn, in 1855, surveyed the adjoining Township 28 (T. 28 S., R. 8 W., hereinafter "T. 28"), using the 6th Standard Parallel South, as he established it, as the northern boundary of the township. Hathorn's survey work was officially accepted and approved in 1856. In 1896, one Heydon surveyed T. 27—the township immediately to the north. His instructions were to begin his survey by setting his own monuments for T. 27 along the Hathorn parallel, which was to be a common line between the two townships. In running his survey of T. 27, Heydon was unable to locate Hathorn's monuments for T. 28 for a distance of two and one-half to three miles in the middle of the six-mile stretch. Nevertheless, he continued to set his own monuments to establish the southern boundary of T. 27, from which he then subdivided

the township.[3] Heydon submitted a plat of his survey which, as the pretrial order states, showed that the southern boundary he established coincided approximately with the northern boundary of Section 1, Section 2, the west half of Section 5, and all of Section 6 of T. 28. (The area of dispute, where the township lines as surveyed failed to coincide, is approximately the northern boundary of Section 3, Section 4 and the east half of Section 5 of T. 28.) Heydon's survey of T. 27 was officially accepted and approved by the United States in 1897. By the official Heydon survey of T. 27, each of Sections 32 through 36 consists of 640 acres and Section 31 consists of 639.60 acres.

The discovery of two sets of monuments during a recent road-building project led to the making of a dependent resurvey in 1961 of the original portions of the Hathorn and Heydon surveys. The resurvey revealed the hiatus designated as T. 27½ S., R. 8 W. (see map in C.A. Op. App.). For a distance of two and one-half to three miles, Heydon's monuments were north of the line connecting the Hathorn monuments. The area of the hiatus was 45.95 acres and its widest point was approximately 300 feet. It was surveyed and subdivided, with these steps receiving official approval in 1962. The plat and diagram of the 1961 resurvey show the southern boundary of T. 27, as originally surveyed by Heydon, and the northern boundary of T. 28, as

[3] Heydon's corners (or monuments) were not "closing corners" (see Pet. 6–7, 11–13)—they were initial, not terminating corners. Had Heydon been able to find Hathorn's corners there would have been two sets of corners along the same line—"double corners"—the Hathorn corners to govern T. 28 and the Heydon corners to govern T. 27.

originally surveyed by Hathorn, as two separate lines for the distance of two and one-half to three miles.

The government has consistently maintained throughout this litigation that actual location, on the ground, of each set of monuments controlled the boundaries of the respective townships each survey created. The theoretical or ideal location of where the monuments should have been established is, in our view, of no consequence. The district court concluded otherwise and entered judgment against the United States. From that judgment, the United States appealed, and the Ninth Circuit reversed. That court concluded that the "one decisive issue" in the case—"whether or not the Government's patents to Weyerhaeuser's predecessors in title conveyed to them the land here in question, which lay outside the boundaries of the Heydon survey," should be answered in the negative (C.A. Op. 7).

ARGUMENT

The decision by the court of appeals is correct and is not in conflict with any decisions of any other courts. It is well supported by a long line of cases holding that what the surveyor in fact marks on the ground demarcates the boundaries of the land surveyed.[4] Moreover, the instant case is of narrow significance because of the special and unusual facts involved. Contrary to petitioner's suggestions (Pet. 6, 11), the decision below is not of general importance and will not result in an unsettling of land boundaries.

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[4] As stated somewhat differently by petitioner (Pet. 6), the established rule is that "the actual locations of the monuments control the areas surveyed by each respective surveyor * * *."

The land here claimed by Weyerhaeuser was never patented to its predecessors in title because the patents to sections in T. 27 were based upon the 1896 Heydon survey which established that township and did not include the land in dispute (see C.A. Op. 6). Such patents could not include more land than was actually and officially surveyed. The monuments set by the official survey control the boundaries of a township and are not subject to judicial correction. *Cragin* v. *Powell,* 128 U.S. 691, 696–700; *United States* v. *State Investment Co.,* 264 U.S. 206, 211–212; *Russell* v. *Maxwell Land Grant Co.,* 158 U.S. 253, 256; 1 Patton, *Land Titles,* Secs. 116, 149, pp. 288–296, 390–391 (2d ed., 1957). This is the approach plainly mandated by Congress in 43 U.S.C. 752 (*supra,* p. 2) and that statute's predecessors (see note 2, *supra*).

Whether Heydon's official public lands survey *correctly* established T. 27 is not a justiciable question. As this Court observed a century ago: "[G]reat confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do." *Haydel* v. *Dufresne,* 17 How. 23, 30 (1854). See *Phelps* v. *Pacific Gas & Electric Co.,* 84 Cal. App. 2d 243, 190 P. 2d 209, 212; *Stonewall Phosphate Co.* v. *Peyton,* 39 Fla. 726, 23 So. 440, 441; 4 Tiffany, *Real Property,* Sec. 994, pp. 96–100 (3d ed. 1939); 6 Thompson, *Real Property,* Secs. 3041, 3058, pp. 558–562, 648–653 (1962 ed.). Moreover, as the court below pointed out,

"There is no problem in this case of impairment of vested rights" (C.A. Op. 7).[5]

CONCLUSION

For the reasons given, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] This is so because, as the court stated: "When the Government in 1896 employed Heydon to survey Township 27, no one except the Government had any rights in the area, all of which was owned by the Government. There being no rights in other persons in 1896, no rights were impaired by what the Government did with or upon its own land" (C.A. Op. 7).

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